No. 16-1094

In the Supreme Court of the United States

REPUBLIC OF SUDAN, PETITIONER

v.

RICK HARRISON, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1330, 1441(d), 1602 *et seq.*, provides four hierarchical and exclusive means for a litigant in the courts of the United States to serve a foreign state. 28 U.S.C. 1608(a)(1)-(4). The third means, in Section 1608(a)(3), provides for "a copy of the summons and complaint and a notice of suit * * * to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." 28 U.S.C. 1608(a)(3).

The question presented is whether service under Section 1608(a)(3) may be accomplished by requesting that the clerk mail the service package to the embassy of the foreign state in the United States, if the papers are directed to the minister of foreign affairs, or whether Section 1608(a)(3) requires that process be mailed to the ministry of foreign affairs in the country concerned.

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Argentine Republic v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) 2, 12

Cases—Continued: Page

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McCulloch v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963) 25
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Persinger v. *Islamic Republic of Iran*, 729 F.2d 835 (D.C. Cir.), cert. denied, 469 U.S. 881 (1984) 25
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Republic of Austria v. *Altmann*, 541 U.S. 677 (2004) 12
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Texas Trading & Milling Corp. v. *Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981), cert. denied, 454 U.S. 1148 (1982) 12
Transaero, Inc. v. *La Fuerza Aerea Boliviana*, 30 F.3d 148 (D.C. Cir. 1994), cert. denied, 513 U.S. 1150 (1995) 14, 18

Cases—Continued: Page

Velidor v. *L/P/G Benghazi*, 653 F.2d 812 (3d Cir. 1981), cert. dismissed, 455 U.S. 929 (1982) 18
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28 U.S.C. 1608(a)(2) 3, 4, 3a
28 U.S.C. 1608(a)(3) ..... *passim*, 3a
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Civil Div., U.S. Dep't of Justice, *Office of Foreign Litigation* (Aug. 1, 2017), https://www.justice.gov/civil/office-foreign-litigation 25
122 Cong. Rec. (1976):
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James Crawford, *Brownlie's Principles of Public International Law* (8th ed. 2012) 22

Miscellaneous—Continued: Page

Ludwik Dembinski, *The Modern Law of Diplomacy* (1988) 22
Eileen Denza, *Diplomatic Law* (4th ed. 2016) 21, 22
H.R. 11315, 94th Cong., 1st Sess. sec. 4(a) [§ 1608] (1975) 30
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Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 94th Cong., 2d Sess. (1976) 31
Letter from Leonard C. Meeker, Acting Legal Adviser, U.S. Dep't of State, to John W. Douglas, Assistant Att'y Gen., U.S. Dep't of Justice (Aug. 10, 1964) 21
Report of the International Law Commission Covering the Work of its Ninth Session, 23 April-28 June 1957, 12 U.N. GAOR Supp. No. 9, U.N. Doc. A/3623 (1957), reprinted in [1957] 2 Y.B. Int'l L. Comm'n 131, U.N. Doc.A/CN.4/SER.A/1957/Add.1 23
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U.S. Dep't of State, 2 *Foreign Affairs Manual* (2013) 26
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INTEREST OF THE UNITED STATES

This case concerns the proper means of effecting service in an action against a foreign state under the Foreign Sovereign Immunities Act of 1976 (FSIA or Act), 28 U.S.C. 1330, 1441(d), 1602 *et seq.* See 28 U.S.C. 1608(a)(3). Litigation against foreign states in U.S. courts can have significant foreign affairs implications for the United States, and can affect the reciprocal treatment of the United States in the courts of other nations. At the Court's invitation, the United States filed a brief as amicus curiae at the petition stage of this case.

Although the United States agrees with petitioner that the court of appeals incorrectly resolved the question presented in this case, the United States deeply sympathizes with the extraordinary injuries suffered by respondents, and it condemns in the strongest possible terms the terrorist acts that caused those injuries. The

United States remains committed to opposing and deterring state-sponsored terrorism and to supporting appropriate recoveries for U.S. victims.

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-6a.

STATEMENT

1. The FSIA provides the sole basis for civil suits against foreign states and their agencies or instrumentalities in United States courts. See, *e.g.*, *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-435 & n.3 (1989). The FSIA establishes that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided" by the Act and "existing international agreements to which the United States [was] a party at the time of [its] enactment." 28 U.S.C. 1604; see *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 355 (1993); *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 488-489 (1983). If a suit comes within a statutory exception to foreign sovereign immunity, the FSIA provides for subject-matter jurisdiction in district courts, 28 U.S.C. 1330(a), as well as for personal jurisdiction over the foreign state "where service has been made under section 1608," 28 U.S.C. 1330(b).

Section 1608(a) provides the exclusive means for serving "a foreign state or political subdivision of a foreign state" in civil litigation. 28 U.S.C. 1608(a); see Fed. R. Civ. P. 4(j)(1). The provision specifies four exclusive methods of service, in hierarchical order. See, *e.g.*, J.A. 176; *Magness* v. *Russian Fed'n*, 247 F.3d 609, 613 (5th Cir.), cert. denied, 534 U.S. 892 (2001). First, service shall be made on a foreign state "in accordance with any special arrangement for service between the plaintiff

and the foreign state or political subdivision." 28 U.S.C. 1608(a)(1). Second, if no such special arrangement exists, service shall be made "in accordance with an applicable international convention on service of judicial documents." 28 U.S.C. 1608(a)(2). Third, if no such international convention applies, service shall be made

> by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned.

28 U.S.C. 1608(a)(3). Fourth, if service cannot be made within thirty days under Section 1608(a)(3), service shall be made by mailing by the clerk of the court to the State Department for service "through diplomatic channels to the foreign state." 28 U.S.C. 1608(a)(4).

2. On October 12, 2000, terrorists bombed the USS *Cole* in the Port of Aden, Yemen. J.A. 84. Seventeen U.S. service members were killed and 42 others were injured. *Ibid.* In 2010, the individual respondents, who are sailors and spouses of sailors injured in the bombing, sued petitioner, the Republic of Sudan, in the District Court for the District of Columbia. Pet. 8. Respondents relied on the cause of action set forth in 28 U.S.C. 1605A, which is available in certain actions against designated state sponsors of terrorism such as the Republic of Sudan. Respondents alleged that petitioner provided material support to the al Qaeda operatives who carried out the bombing. Pet. 8; J.A. 170.

Respondents could not serve petitioner under Section 1608(a)'s first two methods of service. Respondents had no "special arrangement" with petitioner for service,

see 28 U.S.C. 1608(a)(1), and petitioner is not a party to the Convention on Service Abroad of Judicial and Extrajudicial Documents, *done* Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638; see *Kumar* v. *Republic of Sudan*, 880 F.3d 144, 153 n.4 (4th Cir. 2018), petition for cert. pending, No. 17-1269 (filed Mar. 9, 2018); 28 U.S.C. 1608(a)(2). Respondents therefore attempted to serve petitioner under Section 1608(a)(3). J.A. 171-172, 177. They requested that the clerk of the court mail a copy of the summons and complaint via registered mail, return receipt requested, to:

> Republic of Sudan
> Deng Alor Koul
> Minister of Foreign Affairs
> Embassy of the Republic of Sudan
> 2210 Massachusetts Avenue NW
> Washington, DC 20008

J.A. 172 (citation omitted). The clerk did so on November 17, 2010, and the court received a signed receipt on November 23, 2010. J.A. 73-74.

Petitioner did not respond within 60 days of the signed receipt, as required by 28 U.S.C. 1608(c) and (d). Following a hearing, the district court entered a default judgment against petitioner. J.A. 81-83. The court determined that service on petitioner was proper, J.A. 88, and that it had jurisdiction under Section 1605A(a), J.A. 89-127. The court then concluded that respondents had established petitioner's liability under Sections 1605A and 1606, and it awarded respondents $314.7 million in damages. J.A. 81-83, 127-139. Respondents attempted to serve the default judgment on petitioner by the same delivery method—through the clerk's mailing of the papers to the Embassy of the Republic of Sudan in Washington, D.C., in a package directed to the minister of

foreign affairs. J.A. 173; see 28 U.S.C. 1608(e) (requiring service of any default judgment in the manner prescribed for service of the summons and complaint).

3. Respondents registered the default judgment in the District Court for the Southern District of New York. J.A. 173. Both that court and the District Court for the District of Columbia determined that respondents had effected service of the default judgment and that respondents could seek attachment and execution of the judgment. J.A. 173-174; see 28 U.S.C. 1610(c).

Respondents then filed three petitions in the Southern District of New York seeking turnover of assets of petitioner's agencies and instrumentalities held by respondent banks Mashreqbank PSC, BNP Paribas, and Credit Agricole Corporate and Investment Bank—assets that had been frozen pursuant to the Sudanese Sanctions Regulations, 31 C.F.R. Pt. 538. J.A. 174; see Fed. R. Civ. P. 69(a). Respondents again attempted to serve the relevant papers on Sudan by mailing them to the Embassy of the Republic of Sudan in Washington, D.C., in a package directed to the Minister of Foreign Affairs. J.A. 174. The district court granted respondents' petitions and issued three turnover orders against the banks in partial satisfaction of the default judgment. J.A. 149-164.

Petitioner then entered an appearance in the Southern District of New York and timely appealed the issuance of the turnover orders. J.A. 174.[1]

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[1] While that appeal was pending, petitioner entered an appearance in the litigation in the District Court for the District of Columbia and moved to vacate the default judgment under Federal Rule of Civil Procedure 60(b). That motion remains pending. Pet. 11; J.A. 211 n.1; see 10-cv-1689 D. Ct. Doc. 55 (June 14, 2015).

4. The court of appeals affirmed. J.A. 168-189. It concluded that respondents had properly effected service under Section 1608(a)(3) in the original action. J.A. 175-184. The court held that service under Section 1608(a)(3), which requires that process be "addressed and dispatched * * * to the head of the ministry of foreign affairs of the foreign state concerned," 28 U.S.C. 1608(a)(3), could be accomplished by providing for delivery to the "minister of foreign affairs via an embassy address." J.A. 179. According to the court, Section 1608(a)(3) did not require that service be made on the Minister of Foreign Affairs of Sudan at the Ministry of Foreign Affairs in Khartoum, Sudan, because the statute does not expressly state that process must "be mailed to a location in the foreign state," and respondents' method of service "could reasonably be expected to result in delivery to the intended person." *Ibid.*; see J.A. 182 (stating that mailing process to the embassy "makes * * * sense from a reliability perspective and as a matter of policy").

The court of appeals recognized that the FSIA's legislative history "seemed to contemplate—and reject—service on an embassy," in order to "prevent any inconsistency with the Vienna Convention on Diplomatic Relations," which provides that "'[t]he premises of the [diplomatic] mission shall be inviolable.'" J.A. 181-182 (citation omitted; brackets in original). But the court distinguished "'service *on* an embassy'" from "service on a minister of foreign affairs *via* or *care of* an embassy," which the court concluded was permissible and did not implicate "principles of mission inviolability and diplomatic immunity." J.A. 181-183 (brackets and citation omitted). Having concluded that respondents' initial service was proper, the court determined that respondents'

service of the default judgment and all post-judgment motions was proper as well. J.A. 183-184.

5. Following additional briefing and argument in which the United States participated, see J.A. 192-206, the court of appeals denied petitioner's motion for panel rehearing. J.A. 212. Although the court "acknowledge[d]" that the issue "presents a close call," J.A. 213, it adhered to its prior conclusion that Section 1608(a)(3) permitted respondents to serve petitioner by requesting that the clerk mail papers "to the minister of foreign affairs via Sudan's embassy in Washington, D.C.," because the statute "does not specify that the mailing be sent to the head of the ministry of foreign affairs *in* the foreign country," J.A. 214. The court reiterated its view that respondents' method of service "could reasonably be expected to result in delivery to the intended person." *Ibid.* And it again stated that although Section 1608(a)(3) does not permit service "'*on*'" an embassy, "[t]he legislative history does not address * * * whether Congress intended to permit the mailing of service to a foreign minister via an embassy." J.A. 218 (citation omitted).

For similar reasons, the court rejected, "with some reluctance," the United States' argument that the court's interpretation of Section 1608(a)(3) contravenes the Vienna Convention on Diplomatic Relations (VCDR), *done* Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95. J.A. 225; see J.A. 220-225. In the court's view, "service on an embassy or consular official would be improper" under the VCDR, but service with papers "addressed to the Minister of Foreign Affairs via the embassy," conforms to the Convention's requirements. J.A. 222. In addition, while the United States had noted that it "consistently rejects attempted service via direct delivery to a U.S.

embassy abroad" because it believes such service to be inconsistent with international law, the court stated that its rule would "not preclude the United States (or any other country) from enforcing a policy of refusing to accept service via its embassies." *Ibid.* (citation omitted). Finally, the court opined that "the Sudanese Embassy's acceptance of the service package surely constituted 'consent'" for purposes of the VCDR. J.A. 223.

The court of appeals denied rehearing en banc. J.A. 231-232.

SUMMARY OF ARGUMENT

The court of appeals held that the Foreign Sovereign Immunities Act (FSIA or Act), 28 U.S.C. 1330, 1441(d), 1602 *et seq.*, permits service on a foreign state to be effected by sending service papers, directed to the head of the ministry of foreign affairs, to the foreign state's embassy in the United States. J.A. 178-183, 213-225; see 28 U.S.C. 1608(a)(3). That holding contravenes the most natural reading of the statutory text, the United States' treaty obligations, and the FSIA's legislative history. It also threatens harm to the United States' foreign relations and reciprocal treatment in courts abroad. When properly construed, Section 1608(a)(3) requires that the clerk of court send service documents to the ministry of foreign affairs at the foreign state's seat of government.

A. 1. Section 1608(a) provides four exclusive, hierarchical methods for serving a foreign state in litigation in the United States. The third method of service, at issue here, provides for "sending a copy" of the relevant documents "by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." 28 U.S.C. 1608(a)(3). The most

natural understanding of that text is that it requires the clerk both to mark the foreign minister's name or title on the package, and to send it to that individual at his principal place of performing his official duties—the foreign ministry at the foreign state's seat of government.

By contrast, had Congress intended to permit service to be made "via" or in "care of" the foreign state's embassy in the United States, as the court of appeals held, it would have provided for service on the ambassador, or through an agent. Indeed, a neighboring provision, Section 1608(b)(2), expressly provides for service on an agent. Congress's failure to include similar language in Section 1608(a) confirms that it did not intend for embassy personnel to function as de facto agents for forwarding service of process to the head of the ministry of foreign affairs.

2. The court of appeals erred in construing Section 1608(a)(3) to be satisfied by mailing the service package to an embassy. The court stated that such a mailing complied with Section 1608(a)(3) because it "could reasonably be expected to result in delivery to the intended person" and the embassy was a "logical" location for service. J.A. 214 & n.3. But the statutory text refutes the court's imposition of an actual-notice or reasonable-likelihood standard. Unlike Section 1608(a)(3), Section 1608(b)(3) expressly permits service by certain methods "if reasonably calculated to give actual notice." 28 U.S.C. 1608(b)(3). Moreover, the court of appeals' reasoning incorrectly assumes—contrary to Section 1608(a)'s four hierarchical methods of service—that service under Section 1608(a)(3) should be available in most circumstances.

B. The best reading of the statutory text is reinforced by the United States' treaty obligations and diplomatic interests.

1. Article 22(1) of the Vienna Convention on Diplomatic Relations (VCDR), *done* Apr. 18, 1961, 23 U.S.T. 3227, 3237, 500 U.N.T.S. 95, 106, to which the United States is a party, provides that "[t]he premises of" a foreign state's "mission shall be inviolable," and "[t]he agents of the receiving State may not enter them, except with the consent of the head of the mission." The Executive Branch has long interpreted Article 22 and the principle of mission inviolability it codifies to prohibit service on an embassy by mail. That interpretation is shared by other countries and leading commentators, and it is supported by the Convention's drafting history.

2. Failing to protect mission inviolability within the United States would risk harm to the United States' foreign relations. The United States has substantial diplomatic interests in ensuring that foreign states need not appear in domestic courts unless and until they are properly served under the FSIA, in a manner consistent with the United States' treaty obligations. The United States also has a significant interest in receiving reciprocal treatment in courts abroad. At present, the United States routinely refuses to recognize the propriety of service through mail or personal delivery by a private party or foreign court to a United States embassy, even if a mail clerk at the embassy has signed for the package. The rule adopted by the court of appeals threatens the United States' continued ability to successfully assert that it has not been properly served in these instances.

3. The court of appeals agreed that the VCDR prohibits service "on" an embassy, but it concluded that service "via" the embassy does not contravene the Convention. That distinction does not withstand scrutiny. In either case, sending service documents to the

embassy violates mission inviolability as recognized by Article 22 of the VCDR. Nor was the court of appeals correct that the embassy here "consented" to service consistent with the VCDR, for the VCDR provides that only the head of the mission can consent to an intrusion upon inviolability. Nor was the onus on embassy personnel to reject service.

C. Finally, the legislative history of the FSIA confirms that service under Section 1608(a)(3) requires sending the service package to the head of the foreign ministry in the country concerned. Congress considered and rejected statutory language that would have permitted service on ambassadors because of concerns that such service would violate the VCDR. The House Report accompanying the bill that became the FSIA likewise criticized attempts at service by mailing documents "to" an embassy and stated that such service would not be permitted under the Act. And the Federal Rule of Civil Procedure on which Section 1608(a)(3) was patterned, as well as statements at congressional hearings, confirm that Congress expected for service under that provision to occur abroad.

ARGUMENT

SECTION 1608(a)(3) DOES NOT PERMIT SERVICE ON A FOREIGN STATE BY MAILING PROCESS DIRECTED TO THE FOREIGN MINISTER TO THE FOREIGN STATE'S EMBASSY IN THE UNITED STATES

A. The Text Of Section 1608(a)(3) Is Best Read To Require That Service Be Mailed To The Ministry Of Foreign Affairs In The Country Concerned

1. a. Prior to 1976, there was "no statutory procedure for service of process by which [a litigant could]

obtain personal jurisdiction over foreign states." *Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 14 (1973) (Statement of Hon. Charles N. Brower, Legal Advisor, Dep't of State). That changed in 1976, when Congress enacted the Foreign Sovereign Immunities Act.

The FSIA is a "comprehensive statute containing a 'set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities.'" *Republic of Austria* v. *Altmann*, 541 U.S. 677, 691 (2004) (quoting *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 488 (1983)). Under the FSIA, "a foreign state is presumptively immune from the jurisdiction of United States courts." *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 355 (1993); see H.R. Rep. No. 1487, 94th Cong., 2d Sess. 17 (1976) (House Report). "[A] federal court lacks subject-matter jurisdiction over a claim against a foreign state" unless "a specified exception applies." *Nelson*, 507 U.S. at 355; see 28 U.S.C. 1330(a), 1604. And personal jurisdiction over the foreign state exists only where the requirements for subject matter jurisdiction are met and "service has been made under section 1608." 28 U.S.C. 1330(b); see *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 435 n.3 (1989); *Texas Trading & Milling Corp.* v. *Federal Republic of Nigeria*, 647 F.2d 300, 308 (2d Cir. 1981) (the FSIA "makes the statutory aspect of personal jurisdiction simple: subject matter jurisdiction plus service of process equals personal jurisdiction"), cert. denied, 454 U.S. 1148 (1982).

b. Section 1608(a) provides four exclusive, hierarchical means for serving "a foreign state or political subdivision of a foreign state" in civil litigation. 28 U.S.C. 1608(a). The provision at issue here, Section 1608(a)(3), permits a litigant to serve a foreign state

> by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned.

28 U.S.C. 1608(a)(3).

The most natural understanding of the text of Section 1608(a)(3) is that it requires that the service package be mailed to the ministry of foreign affairs at the foreign state's seat of government. The statute mandates that service be "addressed and dispatched * * * to the head of the ministry of foreign affairs of the foreign state concerned." 28 U.S.C. 1608(a)(3). The clerk of court therefore must both "address" the service papers to the head of the ministry of foreign affairs *and* "dispatch" the service package to that individual by sending it to him. See *Webster's Third New International Dictionary* 24, 653 (1966) (defining "address" as "to write or otherwise mark directions for delivery on," and "dispatch" as "to send off or away * * * with promptness or speed often as a matter of official business"); see also *Kumar* v. *Republic of Sudan*, 880 F.3d 144, 155 (4th Cir. 2018), petition for cert. pending, No. 17-1269 (filed Mar. 9, 2018) (statutory language "reinforce[s] that the location [for delivery of service] must be related to the intended recipient," *i.e.*, the minister of foreign affairs). A state's foreign minister does not

work in the state's embassies throughout the world and "is rarely—if ever—present" in those locations. *Kumar*, 880 F.3d at 155. Thus, one would not naturally say that service papers mailed to the foreign state's embassy in the United States have been "addressed and dispatched * * * to the head of the ministry of foreign affairs of the foreign state concerned." 28 U.S.C. 1608(a)(3). And no other statutory language suggests that Congress expected foreign ministers to be served at locations removed from their principal place of performance of their official duties.

The best reading of the statutory text is therefore that delivery must be made to the minister of foreign affairs at his principal place of business—the ministry of foreign affairs in the foreign state's seat of government. And indeed, that is precisely how courts have interpreted the statute, albeit in cases that did not involve respondents' particular method of service. See *Barot* v. *Embassy of The Republic of Zambia*, 785 F.3d 26, 30 (D.C. Cir. 2015) (Section 1608(a)(3) "requires" "sen[ding]" the papers "to the 'head of the ministry of foreign affairs' in Lusaka, Zambia, whether identified by name or title, and not to any other official or agency."); *Transaero, Inc.* v. *La Fuerza Aerea Boliviana*, 30 F.3d 148, 154 (D.C. Cir. 1994) (Section 1608(a)(3) "mandates service of the Ministry of Foreign Affairs."), cert. denied, 513 U.S. 1150 (1995); see also *Gates* v. *Syrian Arab Republic*, 646 F.3d 1, 4 (D.C. Cir.) (no dispute that litigants complied with Section 1608(a)(3) by addressing service to the Syrian Ministry of Foreign Affairs), cert. denied, 565 U.S. 945 (2011). Cf. *Kumar*, 880 F.3d at 155 ("Serving the foreign minister at a location removed from where he or she actually works is at least in tension with Congress' objective, even if it is not strictly prohibited

by the statutory language"). The State Department also has long interpreted Section 1608(a)(3) to require the clerk of court to send service documents "directly to the ministry of foreign affairs of the defendant sovereign state." *Sovereign Immunity: Foreign Sovereign Immunities Act: Service of Process upon a Foreign State*, 1979 Digest ch. 6, § 7, at 894 (quoting State Department message to "all diplomatic and consular posts, sent May 15, 1979").

c. If Congress had intended to permit service on a foreign state "via" its embassy in the United States, as the court of appeals held, *e.g.*, J.A. 216, it would have provided that service be dispatched to the foreign state's ambassador, or to an agent, rather than "addressed and dispatched * * * to the head of the ministry of foreign affairs." 28 U.S.C. 1608(a)(3). As the court below agreed, however, and as other courts have held, service on an embassy or an ambassador is improper under the statute. See J.A. 222; *Autotech Techs. LP* v. *Integral Research & Dev. Corp.*, 499 F.3d 737, 748 (7th Cir. 2007) ("[S]ervice through an embassy is expressly banned * * * by U.S. statutory law."), cert. denied, 552 U.S. 1231 (2008); *Alberti* v. *Empresa Nicaraguense De La Carne*, 705 F.2d 250, 253 (7th Cir. 1983) (service on ambassador is "simply inadequate" under Section 1608(a)(3)).

Nor does the statutory text suggest that Congress intended for embassy personnel to function as "de facto agent[s]" for forwarding "service of process" under Section 1608(a)(3). *Kumar*, 880 F.3d at 159 n.11. The neighboring provision of the FSIA, Section 1608(b)—which governs service on an agency or instrumentality of a foreign state—expressly provides for service by delivery to an "officer, a managing or general agent, or to any other agent authorized by appointment or by law

to receive service of process in the United States." 28 U.S.C. 1608(b)(2). Congress's failure to include similar language in Section 1608(a) underscores that Congress did not envision that service would be sent to a foreign state's embassy for forwarding to the head of the ministry of foreign affairs. See, *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (brackets and citation omitted); see also *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'") (quoting *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803, 809 (1989)).[2]

2. The court of appeals was thus wrong to suggest that Section 1608(a)(3) "is silent as to a specific location

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[2] Section 1608(c), which governs the time when service shall be deemed to have been made, further supports the conclusion that Congress did not intend for service to be made "via" the foreign state's embassy in the United States. Section 1608(c)(2) deems service to have been made under Section 1608(a)(3) on the date of receipt of the signed and returned postal receipt. 28 U.S.C. 1608(c)(2). By contrast, where Congress expected for service to be transmitted via an intermediary—the Secretary of State under Section 1608(a)(4)—it provided for service to be deemed complete when actually transmitted to the minister of foreign affairs. 28 U.S.C. 1608(c)(1). Had Congress intended to allow service under Section 1608(a)(3) to be made "via" the foreign state's embassy in the United States, it likely would have similarly provided that service under that provision be deemed complete when transmitted by the embassy to the foreign minister.

where the mailing is to be addressed." J.A. 178; see J.A. 213. Instead, the text of Section 1608(a)(3) and surrounding provisions indicate that service must be sent to the ministry of foreign affairs in the country concerned. In any event, the court of appeals drew incorrect inferences from what it interpreted to be statutory silence.

a. The court of appeals first contrasted Section 1608(a)(3) with Section 1608(a)(4), which requires the clerk of court to mail papers "to the Secretary of State *in Washington, District of Columbia*." J.A. 215; see J.A. 175-177. As the Fourth Circuit explained in rejecting respondents' method of service in *Kumar*, however, reliance on Section 1608(a)(4) to interpret Section 1608(a)(3) is unpersuasive. Section 1608(a)(3) directs attention to locations in many countries—"to the head of the ministry of foreign affairs of the foreign state concerned." Section 1608(a)(4), by contrast, "directs attention to one known location for one country—the United States—and so can be easily identified." *Kumar*, 880 F.3d at 159.

b. The court of appeals also expressed the view that "[a] mailing addressed to the minister of foreign affairs via Sudan's embassy in Washington, D.C." complied with Section 1608(a)(3) because it "could reasonably be expected to result in delivery to the intended person," J.A. 214, and "makes * * * sense from a reliability perspective and as a matter of policy," J.A. 182. The court thus construed Section 1608(a)(3) to effectively include an actual-notice standard that it believed was satisfied because "[a]n embassy is a logical place to direct a communication intended to reach a foreign country." J.A. 214 n.3.

The court of appeals' rationale is unpersuasive. Where Congress envisioned a reasonable-efforts or actual-notice

standard for service under the FSIA, it said so expressly. Section 1608(b), governing service on an agency or instrumentality, contains a "catchall provision," *Kumar*, 880 F.3d at 154, that permits service by certain methods "if reasonably calculated to give actual notice," 28 U.S.C. 1608(b)(3). Section 1608(b) is therefore "concerned with substance rather than form," *Transaero*, 30 F.3d at 154, and the courts of appeals have "generally h[e]ld" that it "may be satisfied by technically faulty service that gives adequate notice to the foreign state." *Id.* at 153; see, *e.g.*, *First City, Texas-Houston, N.A.* v. *Rafidain Bank*, 281 F.3d 48, 54 (2d Cir.), cert. denied, 537 U.S. 813 (2002); *Magness* v. *Russian Fed'n*, 247 F.3d 609, 616 (5th Cir.), cert. denied, 534 U.S. 892 (2001); *Straub* v. *A P Green, Inc.*, 38 F.3d 448, 453 (9th Cir. 1994); *Sherer* v. *Construcciones Aeronauticas*, 987 F.2d 1246, 1250 (6th Cir.), cert. denied, 510 U.S. 818 (1993); *Harris Corp.* v. *National Iranian Radio & Television*, 691 F.2d 1344, 1352 (11th Cir. 1982); *Velidor* v. *L/P/G Benghazi*, 653 F.2d 812, 821 (3d Cir. 1981), cert. dismissed, 455 U.S. 929 (1982). But Section 1608(a) contains no similar "catchall," *Kumar*, 880 F.3d at 154, and courts generally have interpreted it to require "strict compliance," *ibid.*; *Magness*, 247 F.3d at 615; *Transaero*, 30 F.3d at 154. But see *Peterson* v. *Islamic Republic of Iran*, 627 F.3d 1117, 1129 (9th Cir. 2010) (upholding defective service based on substantial compliance with Section 1608(a)(3) where plaintiffs' counsel, rather than the clerk of court, mailed a copy of the default judgment to the minister of foreign affairs). Thus, while service reasonably calculated to provide actual notice might suffice under Section 1608(b), it is plainly insufficient under Section 1608(a), unless it specifically complies

with one of the enumerated methods of service. See, *e.g.*, *Russello*, 464 U.S. at 23.

The standard applied by the court of appeals also is at odds with Section 1608(a)'s hierarchical structure. The court stated that service by "mail addressed to an embassy" would reliably be transmitted to a foreign state's foreign minister because it could be "forwarded to the minister by diplomatic pouch." J.A. 182. As an initial matter, one sovereign cannot dictate the internal procedures of the embassy of another sovereign. Moreover, the court of appeals' reasoning incorrectly assumes that service under Section 1608(a)(3) should be available in most circumstances. In fact, the statute "specifically contemplates that service via [S]ubsection (a)(3) may not be possible in every foreign state." *Kumar*, 880 F.3d at 160. To that end, it provides that if service under that subsection cannot be made within 30 days, a plaintiff may attempt service under Section 1608(a)(4), which provides for the State Department to transmit service "through diplomatic channels to the foreign state." 28 U.S.C. 1608(a)(4). As the Fourth Circuit correctly observed, "[*t*]*hat* is the subsection that Congress intended plaintiffs to use to take advantage of the reliability and security of the diplomatic pouch." *Kumar*, 880 F.3d at 160.[3]

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[3] The court of appeals' standard is also inconsistent with Congress's delineation in Section 1608(a) of four exclusive methods of service. While the court stated that its opinion did "not suggest" that service under Section 1608(a)(3) could be made "via other offices in the United States * * * , such as, *e.g.*, a consular office, the country's mission to the United Nations, or a tourism office," J.A. 214 n.3, the court provided no reason why its reasonable-efforts or actual-notice standard would not be satisfied by mailing documents to those locations (or others) for forwarding to the minister of foreign affairs. Cf. *Kumar*, 880 F.3d at 155 ("[T]he view that subsection (a)(3) only

B. The United States' Treaty Obligations And Diplomatic Interests Further Demonstrate That The FSIA Does Not Permit Service On A Foreign State By Mailing Process To The Foreign State's Embassy In The United States

1. a. Interpreting Section 1608(a)(3) to require that service materials be sent to the ministry of foreign affairs in the country concerned, not the foreign state's embassy in the United States, also ensures compliance with the Vienna Convention on Diplomatic Relations, which the United States signed in 1961 and ratified in 1972. See 23 U.S.T. 3227. The VCDR "codified long-standing principles of customary international law with respect to diplomatic relations." *767 Third Ave. Assocs.* v. *Permanent Mission of The Republic of Zaire to the United Nations*, 988 F.2d 295, 300 (2d Cir.), cert. denied, 510 U.S. 819 (1993). Article 22 of the VCDR sets out certain obligations of the United States with respect to foreign diplomats and diplomatic missions in this country. *Boos* v. *Barry*, 485 U.S. 312, 322 (1988). Article 22(1) provides that "[t]he premises of" a foreign state's "mission shall be inviolable," and "[t]he agents of the receiving State may not enter them, except with the consent of the head of the mission." VCDR art. 22(1), 23 U.S.T. 3237, 500 U.N.T.S. 106; see also *id.* art. 22(2), 23 U.S.T. 3237, 500 U.N.T.S. 108 ("The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity."). Mission inviolability means, among other things, that

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requires a particular recipient, and not a particular location, would allow the clerk of court to send service to *any* geographic location so long as the head of the ministry of foreign affairs of the defendant foreign state is identified as the intended recipient.").

"the receiving State * * * is under a duty to abstain from exercising any sovereign rights, in particular law enforcement rights, in respect of inviolable premises." Eileen Denza, *Diplomatic Law* 110 (4th ed. 2016) (Denza); see *767 Third Ave. Assocs.*, 988 F.2d at 300 (The VCDR "recognize[s] no exceptions to mission inviolability.").

Section 1608(a)(3) should be interpreted in a manner that is consistent with the United States' obligations under the VCDR. See, *e.g.*, *Cook* v. *United States*, 288 U.S. 102, 120 (1933) ("A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed."); 1 Restatement (Third) of the Foreign Relations Law of the United States § 114 (1987) ("Where fairly possible, a United States statute is to be construed so as not to conflict * * * with an international agreement of the United States."). Construing Section 1608(a)(3) to require that process be mailed to the ministry of foreign affairs in the foreign state protects the inviolability of foreign embassies within the United States.

b. The Executive Branch has long interpreted Article 22 and the customary international law it codifies to preclude serving a foreign state with process by mail or personal delivery to the state's embassy. In 1964, the State Department took the view that "[t]he establishment by one country of a diplomatic mission in the territory of another does not * * * empower that mission to act as agent of the sending state for the purpose of accepting service of process." *Hellenic Lines, Ltd.* v. *Moore*, 345 F.2d 978, 982 (D.C. Cir. 1965) (Washington, J., concurring) (quoting Letter from Leonard C. Meeker, Acting Legal Adviser, U.S. Dep't of State, to John W. Douglas, Assistant Att'y Gen., U.S.

Dep't of Justice (Aug. 10, 1964)). The United States has consistently adhered to that position, including in the court of appeals in this case. See Gov't C.A. Amicus Br. 5-6; Gov't C.A. Amicus Br. at 10-13, *Kumar*, *supra* (No. 16-2267).

As the Fourth Circuit recognized, that "longstanding policy and interpretation" of Article 22 is "authoritative, reasoned, and entitled to great weight." *Kumar*, 880 F.3d at 158; see *Abbott* v. *Abbott*, 560 U.S. 1, 15 (2010) ("It is well settled that the Executive Branch's interpretation of a treaty 'is entitled to great weight.'") (citation omitted); *Sumitomo Shoji Am., Inc.* v. *Avagliano*, 457 U.S. 176, 184-185 (1982); *Kolovrat* v. *Oregon*, 366 U.S. 187, 194 (1961); see generally U.S. Const. Art. II, § 2, Cl. 2, and § 3 (reserving to the Executive Branch the ability to "make Treaties" and "receive Ambassadors and other public Ministers"). The Executive Branch's interpretation is consistent with the prevailing understanding of Article 22. As a leading treatise explains, it is "generally accepted" that "service by post on mission premises is prohibited." Denza 124. Other treatises are in accord. See James Crawford, *Brownlie's Principles of Public International Law* 403 (8th ed. 2012) ("It follows from Article 22 that writs cannot be served, even by post, within the premises of a mission."); Ludwik Dembinski, *The Modern Law of Diplomacy* 193 (1988) (Article 22 "protects the mission from receiving by messenger or by mail any notification from the judicial or other authorities of the receiving State."). And other countries also share this understanding. See, *e.g.*, Pet. Supp. Cert. Br. App. 2a (Note Verbale from the Republic of Austria to the State Department (Apr. 11, 2017)); Kingdom of Saudi Arabia Cert. Amicus Br. 12-14.

Moreover, domestically, the Fourth and Seventh Circuits have recognized that attempting to serve a foreign state or its instrumentality "through an embassy [in the United States] is expressly banned * * * by [the VCDR]." *Autotech Techs. LP*, 499 F.3d at 748; see *Kumar*, 880 F.3d at 156 ("[T]he Vienna Convention's inviolability provision prohibits * * * service delivered to the foreign nation's embassy in the United States.").

The Convention's drafting history also supports the United States' view. See *Water Splash, Inc.* v. *Menon*, 137 S. Ct. 1504, 1511 (2017) (considering treaty drafting history); *Medellin* v. *Texas*, 552 U.S. 491, 507-508 (2008) (same). "[T]he drafters of the Vienna Convention considered and rejected exceptions" to mission inviolability, "opting instead for broad mission inviolability." *767 Third Avenue Assocs.*, 988 F.2d at 298. In a report accompanying a preliminary draft of the VCDR, the United Nations International Law Commission stated that "the receiving State is obliged to prevent its agents from entering the premises for any official act whatsoever." *Report of the International Law Commission Covering the Work of Its Ninth Session, 23 Apr.-28 June 1957*, 12 U.N. GAOR Supp. No. 9, at 6, U.N. Doc. A/3623 (1957), *reprinted in* [1957] 2 Y.B. Int'l L. Comm'n 131, 137, U.N. Doc. A/CN.4/SER.A/1957/Add.1. With respect to service of process specifically, the report explained:

> [N]o writ shall be served within the premises of the mission, nor shall any summons to appear before a court be served in the premises by a process server. Even if process servers do not enter the premises but carry out their duty at the door, such an act would constitute an infringement of the respect due to the mission.

Ibid.

2. This Court has afforded "'great weight'" to the Executive Branch's interpretation of treaties in part because "[t]he Executive is well informed concerning the diplomatic consequences resulting from" judicial interpretations of such agreements. *Abbott*, 560 U.S. at 15 (citation omitted); see also *Verlinden*, 461 U.S. at 493 ("Actions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States."); *Kumar*, 880 F.3d at 157 ("[T]he Court properly considers the diplomatic interests of the United States when construing the Vienna Convention and the FSIA."). Here, the United States has substantial diplomatic interests in ensuring that foreign states are served properly before they are required to appear in U.S. courts, as well as in preserving the inviolability of diplomatic missions under the VCDR. See *Boos*, 485 U.S. at 323 (recognizing the United States' "vital national interest in complying with international law."). By departing from the prevailing understanding of Article 22, the rule adopted by the court of appeals threatens harm to the United States' foreign relations.[4]

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[4] As discussed above, see pp. 1-2, *supra*, the United States also has substantial interests in ensuring that U.S. victims of state-sponsored terrorism receive appropriate recoveries. In light of those interests, on remand, respondents should be permitted to correct the deficient service by requesting that the clerk of court send "a copy of the summons and complaint and a notice of suit * * * to the head of the ministry of foreign affairs" of the Republic of Sudan in Khartoum, Sudan. 28 U.S.C. 1608(a)(3). Cf. *Kumar*, 880 F.3d at 160 (remanding to the district court "with instructions to allow Kumar to perfect service of process in a manner consistent with this opinion"); *Barot*, 785 F.3d at 29-30 (noting that "there is no statutory deadline for service under the Foreign Sovereign Immunities Act" and instructing the district court to "afford" the plaintiff "the opportunity to effect service pursuant to" Section

The decision below also threatens the United States' treatment as a litigant in courts abroad. "[T]he concept of reciprocity * * * governs much of international law," *Boos*, 485 U.S. at 323; and "some foreign states base their sovereign immunity decisions on reciprocity," *Persinger* v. *Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir.), cert. denied, 469 U.S. 881 (1984). See *National City Bank* v. *Republic of China*, 348 U.S. 356, 362 (1955) (noting that foreign sovereign immunity "deriv[es]" in part from "reciprocal self-interest"). It is therefore appropriate to construe the FSIA in light of the United States' interest in reciprocal treatment in foreign courts. *Persinger*, 729 F.2d at 841 (the United States' interest in reciprocity "throw[s] light on congressional intent"); see also *Boos*, 485 U.S. at 323 (respecting the diplomatic immunity of foreign states "ensures that similar protections will be accorded" to the United States); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963) (construing statute to avoid "invit[ing] retaliatory action from other nations").

The United States' reciprocal interests strongly support interpreting the FSIA not to permit service by mail to a foreign state's embassy in the United States. The United States engages in extensive activities overseas in support of its worldwide diplomatic, security, and law enforcement missions, and it is not infrequently sued in foreign courts. See generally Civil Div., U.S. Dep't of Justice, *Office of Foreign Litigation* [(OFL)] (Aug. 1, 2017), https://www.justice.gov/civil/office-foreign-litigation ("At any given time, foreign lawyers

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1608(a)(3) by requesting that the clerk of court send papers "to the 'head of the ministry of foreign affairs' in Lusaka, Zambia") (citation omitted).

under OFL's direct supervision represent the United States in approximately 1,000 lawsuits pending in the courts of over 100 countries."). The State Department and OFL have informed this Office that the United States routinely refuses to recognize the propriety of service through mail or personal delivery by a private party or foreign court to a United States embassy, even if a mail clerk has signed for the package. Instead, when a foreign litigant or court officer purports to serve a complaint against the United States by delivery to an embassy, the United States' practice is that the embassy sends a diplomatic note to the foreign ministry in the forum state, explaining that the United States does not consider itself to have been served consistent with international law and thus will not appear in the litigation or honor any judgment that may be entered against it. See 2 U.S. Dep't of State, *Foreign Affairs Manual* § 284.3(c) (2013). The United States has a strong interest in ensuring that its courts afford foreign states the same treatment that the United States contends it is entitled to under the VCDR. See *Kumar*, 880 F.3d at 158.

3. The court of appeals acknowledged that in light of the Executive Branch's expertise, potential implications for the United States' foreign relations, and reciprocity concerns, the Executive Branch's treaty interpretation is to be afforded "great weight." J.A. 225 (citation omitted). In reality, however, the court "summarily rejected [the government's] position." *Kumar*, 880 F.3d at 159 n.11 (citation omitted); see J.A. 225.

a. The court of appeals again distinguished between "service on an embassy or consular official," which it agreed "would be improper" under the VCDR, J.A. 222, and "mailing papers to a country's foreign ministry *via*

the embassy," which it decided did not violate the Convention, J.A. 216. In particular, the court stated, "where the suit is not against the embassy or diplomatic agent, but against the foreign state with service on the foreign minister *via* the embassy address, we do not see how principles of mission inviolability and diplomatic immunity are implicated." J.A. 182.

As the Fourth Circuit explained, that is an "artificial, non-textual" distinction. *Kumar*, 880 F.3d at 159 n.11; see *id.* at 157 (distinction arises from "meaningless semantic[s]"). Contrary to the court of appeals' suggestion, see J.A. 182-183, a suit against an embassy *is* a suit against the foreign state. See 28 U.S.C. 1603(a); *El-Hadad* v. *United Arab Emirates*, 216 F.3d 29, 31-32 (D.C. Cir. 2000) (treating suit against foreign embassy as suit against the state); *Gray* v. *Permanent Mission of the People's Republic of the Congo to the United Nations*, 443 F. Supp. 816, 820 (S.D.N.Y.) (holding that permanent mission of foreign country to the United Nations is a "foreign state" under the FSIA), aff'd, 580 F.3d 1044 (2d Cir. 1978). Thus, regardless of whether service is made "on" or "via" an embassy, mailing service to the embassy treats it as the state's "de facto agent for service of process," in violation of the VCDR's principle of mission inviolability. *Kumar*, 880 F.3d at 159 n.11. Indeed, the court of appeals' decisions in this case demonstrate that it treated service on an embassy and service "via" an embassy as functionally equivalent: It considered service to have been completed when a return receipt was purportedly received *from petitioner's embassy*, rather than when the package ultimately made its way "to the head of the ministry of foreign affairs of the country concerned," 28 U.S.C. 1608(a)(3). See J.A.

88, 177 & n.5, 210-211, 216-217; but see J.A. 225-226 (declining to consider Sudan's argument that "the evidence does not support a finding that the mailing was accepted by Sudan or delivered to the Sudanese Minister of Foreign Affairs" because it was made "too late").

b. The court of appeals also suggested that service "via" petitioner's embassy was permissible under the VCDR because the embassy "consent[ed]" to service by "accept[ing]" the papers. J.A. 223. That is incorrect. The VCDR provides that "agents of [a] receiving State may not enter [a mission], *except with the consent of the head of the mission*." VCDR art. 22(1), 23 U.S.T. 3237, 500 U.N.T.S. 106 (emphasis added). "Simple acceptance of the certified mailing from the clerk of court [by an embassy employee] does not demonstrate a waiver [of the VCDR's protections]." *Kumar*, 880 F.3d at 157 n.9; cf. VCDR art. 1(a), 23 U.S.T. 3230, 500 U.N.T.S. 96 (defining "head of the mission"); *id.* art. 1(b)-(h), 23 U.S.T. 3230-3231, 500 U.N.T.S. 96, 98 (defining roles of other employees at a diplomatic mission). And no record evidence suggests that petitioner's ambassador to the United States—the head of the mission—was aware of, much less consented to receive, respondents' service of process. See VCDR art. 22(1), 23 U.S.T. 3237, 500 U.N.T.S. 106.

c. For similar reasons, the court of appeals was incorrect to minimize the United States' foreign-relations and reciprocal-treatment concerns on the ground that "the United States (or any other country)" could "enforc[e] a policy of refusing to accept service via its embassies." J.A. 222-223. The VCDR recognizes that foreign states have a legal right to the inviolability of their missions; the burden is not on those states to affirmatively adopt policies to protect that right. The VCDR addresses this

issue by permitting only the "head of the mission" to make exceptions to the default rule of mission inviolability. Art. 22(1), 23 U.S.T. 3237, 500 U.N.T.S. 106. The FSIA should not be read to adopt a different framework.

C. The FSIA's Legislative History Confirms That Congress Intended The Act To Bar Service By Mail To A Foreign State's Embassy In The United States

1. The FSIA's legislative history underscores that Section 1608(a)(3) cannot be satisfied by mailing service papers to a foreign state's embassy. In particular, the legislative history demonstrates that Congress intended for service under the FSIA not to violate Article 22 of the VCDR, and for such service to be delivered abroad.

a. This Court has recognized that "one of the FSIA's basic objectives, as shown by its history," was to "embod[y] basic principles of international law long followed both in the United States and elsewhere." *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1319 (2017); see also, *e.g.*, *Permanent Mission of India to the United Nations* v. *City of New York*, 551 U.S. 193, 199 (2007) (one of the "well-recognized * * * purposes of the FSIA" is the "codification of international law at the time of the FSIA's enactment"). Consistent with that purpose, the legislative history demonstrates that Congress rejected proposed provisions that would have conflicted with the VCDR. An early draft of the FSIA permitted service on a foreign state by "registered or certified mail * * * to the ambassador or chief of mission of the foreign state" in the United States. S. 566, 93d Cong. 1st Sess. sec. 1(1) [§ 1608] (1973). The State Department and Department of Justice recommended removing that method based on their view that it would violate Article 22 of the

VCDR, and a subsequent version of the bill eliminated that method of service. H.R. 11315, 94th Cong., 1st Sess. sec. 4(a) [§ 1608] (1975); see House Report 6, 26; 122 Cong. Rec. 17,465, 17,469 (1976); *Service of Legal Process by Mail on Foreign Governments in the U.S.*, 71 Dep't St. Bull., No. 1840, at 458 (Sept. 30, 1974); see also, *e.g.*, *Helmerich*, 137 S. Ct. at 1320 (noting the State Department's role in drafting the FSIA); *Samantar* v. *Yousuf*, 560 U.S. 305, 323 n.19 (2010) (same). Congress's decision to remove service by mail to a foreign state's ambassador to the United States strongly supports the conclusion that Congress did not intend for the FSIA to permit service "via" or in "care of" an embassy, which is functionally equivalent. See pp. 26-28, *supra*; *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 442-443 (1987) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.") (citation omitted).

The House Report accompanying the bill that became the FSIA further supports the view that service under Section 1608(a)(3) must be sent to the ministry of foreign affairs in the country concerned. The House Report explains that some litigants had attempted to serve foreign states by "mailing * * * a copy of the summons and complaint to a diplomatic mission of the foreign state." House Report 26. The Report describes that practice as being of "questionable validity" and states that "Section 1608 precludes this method so as to avoid questions of inconsistency with section 1 of article 22 of the [VCDR]." *Ibid.* Thus, "[s]ervice on an embassy by mail would be precluded under th[e] bill." *Ibid.*

b. The House Report also confirms that Congress intended for service under Section 1608(a)(3) to occur

abroad. The House Report states that the "procedure" set forth in Section 1608(a)(3) "is based on rule 4(i)(1)(D), F.R. Civ. P." House Report 24. At the time of the FSIA's enactment, Rule 4(i) was entitled "Alternative Provisions for Service *in a Foreign Country*," and Subsection (1)(D) provided for service upon a party in a foreign country "by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served." Fed. R. Civ. P. 4(i) (1976) (emphasis added; capitalization altered). Statements at congressional hearings on the FSIA likewise reflect the understanding that service on a foreign state under Section 1608(a)(3) would occur abroad. Witnesses described Section 1608(a)(3) as providing for service by "mail to the foreign minister *at the foreign state's seat of government*," and as not being complete "unless a signed receipt is received *from abroad*" within a specified period. *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 75, 96 (1976) (emphases added) (testimony of Michael Marks Cohen, Chairman of the Committee on Maritime Legislation of the Maritime Law Association of the United States, and statement of the Committee on International Law of the Association of the Bar of the City of New York).

2. The court of appeals disregarded the legislative history because the House Report "fail[ed] to" recognize what the court viewed as a distinction "between '[s]ervice on an embassy by mail,' and service on a minister [of] foreign affairs via or care of an embassy." J.A. 218 (citation and emphases omitted). But as discussed

above, see pp. 26-28, *supra*, that distinction is merely "semantic[]." *Kumar*, 880 F.3d at 157.

In any event, the court of appeals misread the legislative history. The House Report explicitly disapproved of "attempting to commence litigation against a foreign state" by "mailing * * * a copy of the summons and complaint *to* a diplomatic mission of the foreign state." House Report 26 (emphasis added); see *ibid.* ("Section 1608 precludes th[at] method."). And it makes clear that Congress instead intended for service on a foreign state to occur abroad. See pp. 30-31, *supra*. Congress thus sought to prevent parties from effecting service by mailing process papers to a foreign state's embassy within the United States, regardless of whether the papers are directed to the ambassador—which the court of appeals agreed would violate the FSIA and the VCDR, see J.A. 222—or to the foreign minister, as occurred here.

CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded for further proceedings.

Respectfully submitted.

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APPENDIX

1. 28 U.S.C. 1602 provides:

Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

2. 28 U.S.C. 1603 provides:

Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

3. 28 U.S.C. 1604 provides:

Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

4. 28 U.S.C. 1608 provides:

Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall

send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made—

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

5. Fed. R. Civ. P. 4 provides in pertinent part:

Summons

* * * * *

(j) Serving a Foreign, State, or Local Government.

(1) *Foreign State.* A foreign state or its political subdivision, agency, or instrumentality must be served in accordance with 28 U.S.C. § 1608.

(2) *State or Local Government.* A state, a municipal corporation, or any other state-created governmental organization that is subject to suit must be served by:

(A) delivering a copy of the summons and of the complaint to its chief executive officer; or

(B) serving a copy of each in the manner prescribed by that state's law for serving a summons or like process on such a defendant.

* * * * *

(m) Time Limit for Service. If a defendant is not served within 90 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1), or to service of a notice under Rule 71.1(d)(3)(A).

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